



Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

www.merrimacknh.gov

Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT

DRAFT MINUTES

WEDNESDAY, DECEMBER 18, 2013

Members present: Fran L'Heureux, Patrick Dwyer, Phil Straight, Tony Pellegrino, and Alternates Leonard Worster, Nathan Barry and Richard Conescu.

Member absent: Kevin Shea.

Staff present: Assistant Planner Donna Pohli and Recording Secretary Zina Jordan.

1. **Call to Order**

Fran L'Heureux called the meeting to order at 7:00 p.m. and designated Nathan Barry to sit for Kevin Shea.

2. **Roll Call**

Tony Pellegrino led the Pledge of Allegiance. Patrick Dwyer read the preamble and swore in members of the public who would be testifying.

3. **Global Companies, LLC. (owner) and Nayla Aoude (petitioner)** – Special Exception under Section 2.02.3(C)(1) of the Zoning Ordinance to permit the addition of a drive-thru car wash as an accessory use to the existing Mobil-on-the-Run gasoline station located at 468 Daniel Webster Highway in the C-2 (General Commercial), Elderly Overlay & Aquifer Conservation Districts. Tax Map 5D-3, Lot 125. Case # 2013-25. **This agenda item is continued from the October 23, 2013 meeting. The petitioner has requested to be continued to the February 26, 2014 meeting.**

The Board voted 5-0-0 to continue this item to February 26, 2014, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Tony Pellegrino and seconded by Phil Straight.

4. **John T. Zyla (owner and petitioner)** – Appeal of Administrative Decision under Section 2.02.3(B)(1) of the Zoning Ordinance that determined that public storage of recreational vehicles and/or boats is not a permitted use in the C-2 (General Commercial) District. The parcel is located at 526 Daniel Webster Highway. Tax Map 5D-2, Lot 001. Case 2013-36.

Attorney Greg Michael, Bernstein Shur, said the area in question is only the larger parcel. A 1978 variance allowed the use of warehousing for the retail store and its auctions for many years. At that time, Merrimack had no use-specific ordinance. On October 30, 2007, the Community Development Department sent a letter stating that

an amended use variance from the Zoning Board of Adjustment (ZBA) is necessary. The building has been vacant for several years. Attorney Michael noted that the Merrimack Ordinance has no provisions for a retail/self-storage business. He disagrees with Planning and Zoning Administrator Nancy Larson that the Ordinance does not allow the same activities in two different districts (industrial and commercial). There is no reason not to mix some uses. Only large warehouses but not self-storage is covered in the Ordinance. Customary retail uses and services are allowed in the C-2 (General Commercial) District and should also be allowed in the Industrial District. To allow this use in the Commercial District would not make similar uses in the Industrial District non-conforming. Most other towns have ordinances that allow such a use in the commercial zone. The owners want to re-use the property for a general public retail purpose and not for a traditional warehouse facility. The restrictions are not fair and should not be enforced because the Ordinance does not itemize this activity.

Attorney Chris Aslin, Bernstein Shur, cited Section 2.02.3.B., which allows retail sales and regional customary services in the C-2 (General Commercial) District. He said that Zyla's seasonal storage is for local retail customers to rent space to store boats, snow vehicles, etc., and fits the retail service use. This is not to store materials for a company. It is for individuals to purchase space for their personal service needs. It is not an industrial use and is allowed in both zones in Amherst and Manchester. This is internal storage inside an existing structure and conforms more to a commercial use.

There was no public comment.

Phil straight favored granting the appeal. He called the zoning law outdated. The Simplex and BOCA decisions require zoning boards to be more flexible about land use. Staff can make the decision to allow the use until the Ordinance is changed. Donna Pohli noted that Nancy Larson did not say that the Ordinance does not allow the same activities in two different zones (industrial and commercial). Rather she said that defining the storage facility this way means that these facilities are prohibited in the I-1 (Industrial District). To grant the appeal would make all similar uses in the I-1 District legal nonconforming uses rather than making it a staff decision. Phil Straight allowed that Nancy Larson made the right decision because she cannot break the law. However the ZBA can. In the future, Staff should grant the use. Patrick Dwyer agreed about flexibility, but hesitated to overturn an Administrative Decision. The town can revise the Ordinance later. He did not want to grant blanket authority for future requests. Phil Straight countered that zoning laws are created by people, and they are fallible. The ZBA's job is to follow the court decisions, which changed the zoning laws. Nathan Barry asked for a definition of "similar" use. He did not want to set a "fuzzy" precedent. Attorney Michael said staff has made decisions about uses and districts several times in the past. If there is an issue, staff can refer it to the ZBA. Phil Straight said the ZBA should not review each case. Fran L'Heureux said that, if staff denies a request, the site plan revision would come to the ZBA anyway.

The Board voted 4-1-0 to grant the appeal, on a motion made by Phil Straight and seconded by Tony Pellegrino. Patrick Dwyer voted in the negative.

5. John T. Zyla (owner and petitioner) – Variance under Section 2.02.3(B) to allow public storage of recreational vehicles and/or boats in the C-2 (General

Commercial) District. The parcel is located at 526 Daniel Webster Highway. Tax Map 5D-2, Lot 001. Case 2013-37.

At the applicant's request, this item was tabled until the end of the statutory appeal period for item #4, by a vote of 5-0-0, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

6. Discussion/possible action regarding other items of concern

Phil Straight, referring to agenda item #4, did not intend a slap in the face to staff, but the issue is simple. Patrick Dwyer agreed, but was skeptical of giving blanket approval. Phil Straight said the Planning Board would review future plans. The ZBA's only job concerns the use. Patrick Dwyer favored using Zyla's existing buildings. Tony Pellegrino said staff could look deeper into a request and return to the ZBA if there are questions. Richard Conescu did not understand why a use could not be both commercial and industrial. Phil Straight said that, in the early 1980s, no one thought about storage; it was uncommon. The laws have been updated in the last 25 years. He would not overturn an Administrative Decision lightly, but the zoning laws should be updated to accord with recent court decisions. Leonard Worster said there is no issue in this particular case; there is no other situation like this in a commercial zone in Merrimack. Patrick Dwyer said no one knows whether there will be others in the future. Richard Conescu asked why permitting the use in the commercial zone is a problem for the use in an industrial district. Donna Pohli said there are two different ways to define a storage facility, one of which is specifically prohibited in the I-1 District. Now that the ZBA has allowed public/self-storage as a permitted retail use in the commercial zone, prior interpretations that resulted in approval and construction of three self-storage/public storage facilities in the I-1 (Industrial) District would become legal non-conforming uses because they are technically prohibited. Richard Conescu said there would have to be an appeal in a future case, since the ZBA just said it is no longer conforming in the I-1 (Industrial) District. Phil Straight stated that future cases would still have to go to the Planning Board. Nathan Barry characterized the classifications of what is allowed in the industrial and commercial districts as mutually exclusive. The ZBA's intent was to add the use to what is allowed in the Commercial District; it did not want to say the use is not allowed in the Industrial District. Richard Conescu noted that is not what happened. Precedent was set. Fran L'Heureux asked if already-approved industrial storage would be affected. Donna Pohli said it is Nancy Larson's determination if they are legal non-conforming uses. In the future, such type of storage will have to come to the ZBA. Phil Straight stated that the use is already approved in the Industrial District; the ZBA just allowed it in the Commercial District. Richard Conescu stated that the ZBA redefined what a storage facility is. It is not a warehouse but a retail use. The ZBA just reclassified all warehousing as a commercial rather than an industrial use. Patrick Dwyer opined that the ZBA just allowed the use in both the Commercial and Industrial Districts. The decision does not preclude allowing the use in the Industrial District. An applicant no longer needs a variance for storage in the Commercial District and gives staff more approval and oversight authority. Nathan Barry said the motion was to allow the use in the Commercial District. Richard Conescu agreed that the Ordinance should be updated. Tony Pellegrino likened the situation to the one about signs, for which there was no code. He used Shaw's as an example. Leonard Worster and Donna Pohli

concurred that the sign was part of Planning Board approval. Donna Pohli referred the ZBA to Section 17 of the Zoning Ordinance.

Phil Straight announced that Attorney Upton would make a presentation on the Right-to-Know law to all Town boards, who may attend on January 21, February 5, or February 11, 2014.

7. Approval of Minutes – November 20, 2013

The minutes of November 20, 2013, were approved as submitted, by a vote of 4-0-1, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino. Nathan Barry abstained.

8. Adjourn

The meeting adjourned at 7:45 p.m., by a vote of 5-0-0, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.